RECORD
AND
BRIEFS

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No. 10-1491

IN THE

Supreme Court of the United States

ESTHER KIOBEL, ET AL.,

Petitioners,

—v.—

ROYAL DUTCH PETROLEUM CO., ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

AMICUS BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION ON REARGUMENT IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with approximately 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. The Alien Tort Statute (ATS), 18 U.S.C. § 1350, which is at issue in this case, provides a federal forum for the vindication of those principles by enforcing certain customary international law norms in discrete circumstances.

Enacted in 1789 as part of the first Judiciary Act, the ATS creates federal court jurisdiction to resolve claims by aliens alleging torts in violation, *inter alia*, of the "law of nations." Despite its long history, this Court has issued only one decision construing the ATS. The ACLU was co-counsel in that case, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), and has since invoked the ATS to litigate claims on behalf of its clients in several other cases involving torture, *see Ali v. Rumsfeld*, 649 F.3d 762 (D.C. Cir. 2011); *El-Masri v. Tenet*, 479 F.3d 296 (4th Cir.), *cert. denied*, 552 U.S. 947 (2007), and forced disappearances, *see Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 2442 (2011).

As reframed by the Court in its reargument order, this case now calls into question the territorial

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[1] The parties have lodged blanket consents to the filing of amicus briefs in support of either party or neither party. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to this brief's preparation or submission.

reach of the ATS. Inescapably, therefore, it also calls into question the ability of U.S. courts to continue to provide a judicial forum for aliens, like these petitioners, who allege that they were victimized by conduct that the civilized world unequivocally condemns. As the country's oldest and largest civil liberties organization, the ACLU and its members have a significant interest in the proper resolution of that question.

STATEMENT OF THE CASE

This case comes to the Court on a motion to dismiss, and the allegations of the complaint must be accepted as true.

Plaintiffs are Nigerian citizens, all of whom are now legal residents in the United States. Plaintiffs formerly resided in the Ogoni region of Nigeria, an area rich in oil reserves. In the early 1990's, the Nigerian government brutally suppressed a movement formed by plaintiffs and others to protest the environmental damage caused by oil exploration in the region. The complaint alleges that the Nigerian government was acting at the behest of the Shell Petroleum Development Company of Nigeria, Ltd., a joint subsidiary of the Royal Dutch Petroleum Company from the Netherlands and the Shell Transport and Trading Company from the United Kingdom. The complaint further alleges that these corporate defendants aided and abetted a series of human rights violations, including: extrajudicial killing, torture, crimes against humanity (rape), arbitrary arrest and detention, and forced exile.

The district court dismissed some claims and allowed others to go forward. On appeal, a divided

panel of the Second Circuit dismissed the entire complaint on the ground that corporations could not be sued under the ATS. Beginning with the premise that the ATS is a jurisdictional statute whose substantive law is derived from "the law of nations," the majority held that it was necessary to look to international law to resolve who could be sued under the ATS. It then concluded that international law did not contemplate suits against corporations for violating human rights. In a separate opinion concurring only in the judgment,[2] Judge Leval argued that international law determines the specific, universal, and obligatory norms that can be enforced through the ATS, but leaves to each nation the duty to determine who can be sued and what remedies are available. As a matter of U.S. law, he then noted, both individuals and corporations can be held liable for torts.

The question initially presented to this Court for review was whether corporations could be sued under the ATS. Following briefing and argument, however, the Court directed the parties to file supplemental briefs addressing "whether and under what circumstances the Alien Tort Statute, 28 U.S.C. § 1350, allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States." The Court also restored the case to the calendar for reargument.

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[2] Despite disagreeing with the majority's interpretation of the ATS, Judge Leval concurred in the judgment on the ground that plaintiffs' complaint did not satisfy the pleading standards set by this Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

SUMMARY OF ARGUMENT

1. The question of extraterritoriality posed by the Court can be understood in two ways. The first, and simpler, question is whether Congress has the power to confer subject matter jurisdiction on the federal courts to adjudicate alleged violations of the law of nations between foreign nationals occurring overseas, assuming that there is a basis to assert personal jurisdiction over the defendants.[3] The answer to that question is certainly yes. This Court has repeatedly stated that the question of extra-territorial application is one of congressional intent and not constitutional authority.

The second, and more relevant, question is whether Congress intended the jurisdiction conferred by the ATS to reach violations of specific, universal, and obligatory norms of customary international law, even if they occur outside the territory of the United States. We agree with petitioners that the fairest reading of the text, history and purpose of the ATS is that it was intended to reach universally recognized human rights violations of the sort alleged in this complaint wherever they occur.

That does not mean, of course, that the ATS provides federal courts with a roving commission to solve the world's ills. It does mean, in our view, that the "restrained conception" of the ATS adopted by this Court in *Sosa* is not based on notions of territoriality but rather on the requirement that any

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[3] As used in the ATS, the "law of nations" refers to the body of law now known as customary international law. *See Flores v. Southern Peru Copper Corp.*, 414 F.3d 233, 237 n.2 (2d Cir. 2003).

human rights violations asserted under the ATS "rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th century paradigms" – violations of safe conduct, infringement of the rights of ambassadors, and piracy – identified by Blackstone and understood by the First Congress that enacted the ATS. *Sosa*, 542 U.S. at 725. That proposition is discussed at length in petitioners' brief and not repeated here.

2. This brief focuses instead on the presumption against extraterritoriality and, more specifically, why that canon of statutory construction does not apply to the ATS. The presumption against extraterritoriality is a rule of "prescriptive comity," *F. Hoffman-LaRoche v. Empagran S.A.*, 542 U.S. 155, 164 (2004). It is "based on the assumption that Congress is primarily interested with domestic conditions," *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949), when it prescribes substantive rules of conduct. Before concluding that Congress intended its prescriptive rules to apply to conduct occurring outside the U.S., this Court has therefore required a "clear indication" of congressional intent. *Morrison v. National Australian Bank Ltd.*, 130 S. Ct. 2869, 2883 (2010).

The ATS, however, is not a prescriptive statute. It is a jurisdictional statute that addresses "the power of the courts to entertain cases" alleging the violation of specific, universal and obligatory norms of customary international law. *Sosa*, 542 U.S. at 714. Because the ATS does not involve the application of substantive U.S. law to conduct

occurring outside the U.S, the presumption against extraterritoriality plays no role in this case.[4]

To be sure, once a court accepts jurisdiction under the ATS, it must determine whether the defendants' conduct violated a legal norm. But that legal norm is determined by reference to customary international law norms that, under *Sosa*, must satisfy a high level of universality and specificity—not by reference to domestic U.S. law. Accordingly, the ATS does not present the risk of prescriptive overreaching that lies behind the presumption against extraterritoriality. If this case is allowed to go forward, the legality of defendants' conduct in Nigeria will not be assessed on the basis of substantive U.S. legal standards. It will be assessed on the basis of specific, universal, and obligatory norms of customary international law that have been accepted by the civilized world and have legal force everywhere.

EEOC v. Arabian American Oil Co., 499 U.S. 244 (1991) (*Aramco*), provides a useful contrast. The issue there was whether the anti-discrimination prescriptions of Title VII apply to U.S. companies operating overseas. The case thus raised the possibility of "unintended clashes between our laws and those of other nations, which could result in international discord." *Id.* at 248 (citations omitted).

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[4] Substantive law refers in this context to the standards of conduct that are enforceable under the ATS. It does not refer to the analytically distinct questions of who can be sued and what remedies are available. Under customary international law, those questions are left to the federal common law, as discussed at length in the initial briefs filed by petitioners and their supporting *amici*.

Given the potential conflict between two bodies of substantive law – U.S. versus Saudi Arabian – the Court concluded that the presumption against extraterritoriality applied and, consequently, the antidiscrimination prescriptions of Title VII did not. Because the presumption against extraterritoriality does not apply in this case, the Court must look to the text, history and purpose of the ATS to determine the proper scope of the statute's jurisdictional grant.

3. A holding that the ATS extends to certain international law violations occurring outside the U.S. is fully consistent with the *Charming Betsy* principle that ambiguous statutes should be construed in harmony with international law whenever possible. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1804). Indeed, it would be exceedingly odd to hold that the enforcement of international law is somehow at odds with international law. Nothing in *Charming Betsy* demands that anomalous result. Just the opposite is true. The narrow category of international law violations that can be enforced under the ATS fits comfortably within the category of international law violations over which a state may exercise universal jurisdiction, *see* Restatement (Third) of Foreign Relations Law of the United States, § 404, and may also provide a civil remedy. *See, e.g., Sosa*, 542 U.S. at 762 (Breyer J., concurring).

4. The fact that there may be cases in which it can be argued that alleged human rights violations should be tried in jurisdictions with a closer nexus to the alleged tort or the alleged tortfeasors is not a reason to read a jurisdictional bar into the ATS where there is none. Nor does it present a problem

unique to the ATS. When such situations arise, they can be dealt with through familiar discretionary doctrines, such as abstention and *forum non conveniens*.

ARGUMENT

I. THE PRESUMPTION AGAINST EXTRA-TERRITORIALITY DOES NOT APPLY TO THE ATS, WHICH CONFERS JURISDICTION ON U.S. COURTS TO HEAR CASES INVOLVING VIOLATIONS OF CUSTOMARY INTERNATIONAL LAW BUT DOES NOT IMPOSE SUBSTANTIVE U.S. LAW ON ACTIVITIES THAT OCCUR OUTSIDE THE U.S.

The ATS does not provide a cause of action or prescribe a course of conduct. It is a jurisdictional statute. The presumption against extraterritoriality does not apply to jurisdictional statutes but only to claims that the substantive prescriptions of U.S. law apply to activity occurring outside the U.S. It is, therefore, irrelevant in this case.

A. The ATS Is A Jurisdictional Statute.

Sosa establishes beyond doubt that the ATS is a jurisdictional statute. As the Court pointed out, "the ATS gave the district court 'cognizance' of certain causes of action, and the term bespoke a grant of jurisdiction . . ." 542 U.S. at 713 (citing The Federalist Papers). As the Court also observed, "[t]he fact that the ATS was placed in § 9 of the Judiciary Act, a statute otherwise exclusively concerned with federal-court jurisdiction, is [further] support for its strictly jurisdictional nature." *Id.*

The question on which the parties divided in *Sosa* was whether the ATS provided a cause of action in addition to federal court jurisdiction and, if so, what determined the contours of that cause of action. The Court agreed with defendants that the ATS did not provide a cause of action, but it rejected defendants' position that a lawsuit under the ATS could not proceed absent a federal statute conferring a cause of action. Rather, the Court held that the cause of action was created by the common law, and that the common law at the time the ATS was enacted included torts in violation of the law of nations. "[A]lthough the ATS is a jurisdictional statute creating no new causes of action," the Court wrote, "the reasonable inference from the historical materials is that the statute was intended to have practical effect the moment it became law." *Id.* at 724.

Sosa likewise rejected the notion that the list of torts that can be asserted today in an action invoking the jurisdiction of the ATS was frozen in time in 1789. Recognizing that the law of nations has evolved in the past two centuries, while simultaneously embracing a "restrained conception" of the role of federal courts in construing that law, the Court held that "any claim based on the present-day law of nations [must] rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the 18th century paradigms" that Congress had in mind when the ATS was enacted. *Id.* at 725.

In short, the Court's unanimous holding in *Sosa* that the ATS "is only jurisdictional," *id.* at 729, followed an explicit discussion of the distinction

between jurisdictional statutes and prescriptive statutes. Jurisdictional statutes authorize the courts to adjudicate the substantive merits of a claim; they do not define the substantive rules of decision. That is precisely how the ATS operates.[5] It addresses "the power of the courts" to adjudicate torts in violation of the law of nations, *Sosa*, 542 U.S at 714, quoting *United States v. Cotton*, 535 U.S. 626, 630 (2002), but the definition of those torts – for example, what constitutes a crime against humanity – comes from customary international law, not the ATS.

B. The Presumption Against Extra-territoriality Does Not Apply To Jurisdictional Statutes.

The presumption against extraterritoriality is an aid to statutory construction that rests on two related propositions. First, it is a rule of comity that recognizes that each sovereign state normally determines the boundary between lawful and unlawful conduct within its own borders. Second, it reflects the empirical observation that most legislation is focused on domestic concerns rather than conduct occurring elsewhere.

Neither rationale applies to the ATS. Customary international law creates binding norms that, by definition, apply everywhere. In *Sosa*, this Court identified a subset of those norms that were cognizable under the ATS, describing them as "specific, universal, and obligatory." 542 U.S. at 732.

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[5] The distinction is a familiar one and is closely related to the corollary principle that the question of jurisdiction is separate and apart from whether the plaintiff has stated a claim for relief. *See, e.g., Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998); *Bell v. Hood*, 327 U.S. 678, 682 (1946).

The assumption that nations typically legislate with a domestic focus when they develop substantive legal rules in response to domestic concerns similarly loses its salience when the rules at issue are based on international law and developed through an international legal consensus.

The presumption against extraterritoriality thus rests on a set of premises that do not apply to a jurisdictional grant, like the ATS. It is hardly surprising, therefore, that the cases in which this Court has applied the presumption against extra-territoriality involve prescriptive statutes that are very unlike the ATS because they create their own substantive rules.

For example, in *Morrison v. National Australian Bank Ltd.*, 130 S. Ct. 2869 (2010), the issue was whether the prohibition against fraud in the purchase or sale of securities set forth in § 10(b) of the Securities Exchange Act, 15 U.S.C. § 78j(b), and SEC Rule 10b-5, 17 C.F.R. § 240-10b-5, permitted a suit by foreign investors against U.S. firms (among others) involving securities traded on a foreign exchange. Applying the presumption against extraterritoriality, the Court held that § 10(b) does not extend to foreign transactions.

At the outset of its opinion, the Court stressed that the presumption against extraterritoriality is a canon of construction that assists in understanding the meaning of a statute; it is not a limit on the power of Congress to legislate with extraterritorial effect if it chooses to do so. 130 S. Ct. at 2788. Like any rebuttable presumption, the presumption against extraterritoriality can be overcome by a clear

indication of contrary intent.[6] Finding no indication that Congress intended § 10(b) to apply extraterritorially, the Court ruled that it did not.

The Court explained the presumption against extraterritoriality in *Morrison* as "rest[ing] on the perception that Congress ordinarily legislates with respect to domestic, not foreign matters." *Id.* at 2788. In *Foley Bros. v. Filardo*, 336 U.S. 281, 285 (1949), the Court similarly relied on "the assumption that Congress is primarily concerned with domestic conditions" to hold that a U.S. citizen employed as a cook in Iraq and Iran could not claim the benefit of a federal law limiting U.S. employees to an eight hour workday. And, in *Smith v. United States*, 507 U.S. 197 (1993), the Court ruled that a worker killed in Antarctica while employed by the U.S. government could not bring a wrongful death action under the Federal Tort Claims Act, citing "the commonsense notion that Congress generally legislates with domestic concerns in mind."[7]

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[6] The intent of Congress need not be expressed in the statutory text, but it must nonetheless be evident through the traditional tools of statutory interpretation. *Morrison*, 130 S. Ct. at 2883.

[7] *See also Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 174 (1993). In *Sale* the Court ruled that a provision of the Immigration and Nationality Act prohibiting the Attorney General from "return[ing] any alien" to a country where the alien's life or freedom "would be threatened . . . on account of race, religion, nationality, membership in a particular social group, or political opinion," 8 U.S.C. § 1253(h), which implemented a corresponding provision in the United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6233, T.I.A.S. No. 6577, did not apply outside the U.S. It therefore upheld an Executive Order directing the Coast Guard to interdict boats on the high seas that were illegally bringing

That "commonsense notion" ceases to be commonsensical when applied to the ATS. The ATS was neither conceived nor crafted as an exercise in substantive rulemaking intended to respond to uniquely domestic concerns. By its express terms, it simply provides a forum in the U.S. for aliens seeking to vindicate violations of customary international law.

Because the substantive law enforceable under the ATS is based on customary international law, the ATS does not pose a risk of "unintended clashes between our laws and those of other nations which could result in international discord." *Aramco*, 499 U.S. at 248. *Aramco* presented a very different situation. Mindful of the fact that U.S. views on gender equality are not universally shared by other nations, the Court held that the anti-discrimination

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Haitians to the U.S. and to return the passengers to Haiti without first determining if they qualified as political refugees.

The Court's decision was primarily based on a review of "the text and structure of the statute," as well as "the text and negotiating history of the Convention." *Id.* at 171. One paragraph of the Court's opinion also referred to the presumption against extraterritoriality. *Id.* at 173–74. Aside from the brevity of the Court's discussion, the statutory and treaty provisions at issue in *Sale* are easily distinguishable from the ATS. What they share in common is an effort to enforce international law. But the ATS is directed at the power of the courts and the provisions in *Sale* were directed at the responsibilities of executive officials. In other words, the ATS is jurisdictional and the provisions addressed in *Sale* are prescriptive.

provisions of Title VII did not apply to U.S. companies operating in Saudi Arabia.[8]

Likewise, in *F. Hoffman La-Roche Ltd. v. Empagran S.A.*, 542 U.S. 155 (2004), the Court rejected a price-fixing claim brought under the Sherman Act by foreign purchasers of vitamin products where the relevant transactions occurred entirely outside the U.S. and the plaintiffs were alleging an independent foreign harm. Under those circumstances, the Court noted that extraterritorial application of U.S. antitrust laws could "interfere with a foreign nation's ability independently to regulate its own commercial affairs." *Id.* at 165.

Most explicitly, in *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437 (2007), the Court refused to apply U.S. patent law to an infringement claim based on software code created in the U.S. but copied and installed by a foreign manufacturer in computers made overseas. "The presumption that United States law governs domestically but does not rule the world applies with particular force in patent law," the Court said, because "foreign law may embody different policy judgments about the relative rights of inventors, competitors, and the public in patent inventions." *Id.* at 454–55 (internal citation omitted).

Reflecting that concern, this Court has characterized the presumption against extra-territoriality as a rule of "prescriptive comity." *F. Hoffman La-Roche Ltd.*, 542 U.S. at 164, citing

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[8] In response to the *Aramco* decision, Congress amended the definition of an employee under Title VII to include U.S. citizens working overseas for U.S. companies. 42 U.S.C. § 2000e(f).

Hartford Fire Ins. Co. v. California, 509 U.S. 764, 817 (1993) (Scalia, J. dissenting). That characterization both describes the presumption and defines its limits. The ATS clearly falls outside those limits. It is not prescriptive and it does not raise any comity issues because it does not attempt to impose U.S. standards of conduct on the rest of the world.

A recent exchange between Justice Stevens and Justice Ginsburg in *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 130 S. Ct. 1431 (2010), helps to explain why the presumption against extraterritoriality does not apply to the ATS. Although the case arose in a purely domestic context, its discussion of the presumption against extraterritoriality is nevertheless instructive.

The plaintiff in *Shady Grove* brought a class action in federal court seeking statutory interest based on the late payment of accrued insurance benefits. The claim arose under New York State law. Plaintiff nonetheless filed in federal court because a separate New York State statute barred class actions seeking statutory penalties, including interest. The question before the Court was whether the state bar on class actions applied in federal court under *Erie*, or whether the propriety of a federal class action should be determined by reference to Rule 23 of the Federal Rules of Civil Procedure. By a 5-4 vote, the Court ruled that Rule 23 was controlling.

Justice Ginsburg dissented. In her view, the class action bar was best understood as part of New York's substantive law creating an entitlement to statutory interest and thus binding on the federal courts under *Erie*. She reached this conclusion by construing the class action bar to apply only to statutory penalties

authorized by New York law and not to cases seeking statutory penalties under another source of law, even if they were litigated in New York. Invoking a version of the presumption against extra-territoriality, she wrote: "New York legislators make law with New York plaintiffs and defendants in mind, *i.e.*, as if New York were the universe." *Id.* at 1470.

Justice Stevens disagreed — not with her characterization of New York legislators but with its relevance — in a concurring opinion that provided the critical fifth vote for the majority. Although dealing with state law rather than federal law, his comments on the presumption against extraterritoriality are instructive.

> [W]e sometimes presume that laws cover only domestic conduct and sometimes do not, depending upon, *inter alia*, whether it makes sense in a given situation to assume that "the character of an act as lawful or unlawful must be determined wholly by the law of the [place] where the act is done," *American Banana Co. v. United Fruit Co.*, 213 U.S. 347, 356 (1909). But in the context of [New York's class action rule], a presumption against extraterritoriality makes little sense. That presumption applies almost only to laws governing what people can or cannot do. [The New York rule], however, is not directed to the conduct of persons but is instead directed to New York courts.

Id. at 1458.

So, too, the ATS is not "directed to the conduct of persons" and does not establish a set of rules "governing what people can or cannot do." Rather, it is a jurisdictional statute directed to "the power of the courts." *Sosa*, 542 U.S. at 714. As in *Shady Grove*, therefore, "a presumption against extraterritoriality makes little sense." 130 S. Ct. at 1458. Even the dissent in *Shady Grove* tacitly accepted the proposition that the presumption against extraterritoriality only applies to substantive laws. It reached a different conclusion because it began from a different premise: namely, its view that the challenged statute was more substantive than procedural. *Sosa*, however, definitively resolves that question with regard to the ATS. In this Court's words, the ATS "is only jurisdictional." 524 U.S. at 729.

Of course, the ATS authorizes U.S. courts to adjudicate a set of substantive rules, but those rules are derived from customary international law. As long as U.S. courts are applying international law norms as opposed to domestic norms under the ATS, there is no reason to fear that the ATS will become a vehicle for imposing U.S. law on the rest of the world. Removing the presumption against extraterritoriality does not automatically mean that the ATS confers jurisdiction on the federal courts to adjudicate those torts in violation of the law of nations recognized by *Sosa* if they occur overseas and involve foreign nationals, as in this case. It does mean that the effort to determine congressional intent must be pursued without a finger on the scale. For the reasons set forth in petitioners' brief, we agree that the ATS provides jurisdiction to

adjudicate the serious human rights violations that petitioners have alleged in their complaint.

II. UTILIZING THE ATS TO ENFORCE INTERNATIONAL LAW IS CONSISTENT WITH INTERNATIONAL LAW

Although the presumption against extraterritoriality does not apply in this case, even jurisdictional statutes must be read in light of the *Charming Betsy* principle that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. Schooner Charming Betsy*6 U.S. (2 Cranch.) 64 (1804) at 118. That said, it would be paradoxical, at the very least, to hold that it is somehow inconsistent with international law to permit U.S. courts to enforce international law pursuant to the ATS. Nothing in the *Charming Betsy* principle, or this Court's cases construing it, requires such a counter-intuitive result.

This Court has most frequently invoked the *Charming Betsy* principle to limit the territorial reach of U.S. law in maritime cases. *See McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 21–22 (1963) (provisions of the National Labor Relations Act do not extend to foreign-flag ships employing alien seamen); *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 382–83 (1959) (foreign sailor injured aboard a foreign vessel in U.S. waters cannot assert a claim for damages under the Jones Act); *Lauritzen v. Larsen*, 345 U.S. 571, 577 (1953) (same).

In each of those cases, the Court presumed that Congress had legislated against the backdrop of

international law, and then looked to international law to resolve what it regarded as a conflict-of-law issue. The ATS, however, does not present a conflict-of-law issue because it does not establish any substantive legal rules. As previously noted, the ATS "is only jurisdictional." *Sosa*, 542 U.S. at 729. Unlike the Jones Act and the NLRA, the ATS does not require a court to decide whether U.S. law or foreign law governs in a situation where either might be applicable. Instead, the law applied in an action brought under the ATS is based on specific, universal, and obligatory norms that are defined by customary international law. Every nation is bound to adhere to those norms and thus the conflict-of-law issue that concerned the Court in the maritime cases does not exist here.

The category of torts that U.S. courts have found cognizable under the ATS also are proper subjects for the exercise of universal jurisdiction. *See* Restatement (Third) of Foreign Relations Law of the United States, § 404 (1986). For that reason, there is also no merit to any claim that extraterritorial application of the ATS would be inconsistent with international law.

The subject of universal jurisdiction is discussed at greater length in other briefs. For present purposes, it is sufficient to quote Justice Breyer's concurring opinion in *Sosa*:

> Recognition of universal jurisdiction in respect to a limited set of norms is consistent with principles of international comity. That is, allowing every nation's courts to adjudicate foreign conduct involving foreign parties in such cases will not significantly threaten the

> practical harmony that comity principles seek to protect. That consensus concerns criminal jurisdiction, but consensus as to universal criminal jurisdiction itself suggests that universal tort jurisdiction would be no more threatening. Cf. Restatement § 404, Comment *b*.

542 U.S. at 762.

Justice Breyer further recognized that "universal criminal jurisdiction necessarily contemplates a significant degree of civil tort recovery as well." *Id.* *See also* Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, G.A. Res. 60/147, U.N. Doc. A/RES/60/147 (Dec. 16, 2005).

During the first oral argument in this case, questions were raised about the propriety of adjudicating the claims in this case because they arise overseas and the parties involved on both sides are foreign nationals. Transcript of Oral Argument at 11–12 (10-1491) (Feb. 28, 2012). Whether the U.S. is the best forum to adjudicate these claims, however, is a prudential question, not a jurisdictional question. It goes to the exercise of jurisdiction, not the existence of jurisdiction. *Cf. Hartford First Ins. Co. v. California,* 509 U.S. at 799 ("We have no need in this litigation to address other considerations that might inform a decision to refrain from *the exercise of jurisdiction* on grounds of international comity.") (emphasis added).

Nor is it a question that uniquely arises under

the ATS or in the context of determining the extraterritorial reach of congressional statutes. For example, this Court has developed a set of rules to determine when federal courts should abstain in favor of state court adjudication, either because the case involves an uncertain issue of state law, *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496 (1941), or to avoid interference with pending state proceedings, *Younger v. Harris*, 401 U.S. 37 (1971).

If there is an alternative forum abroad, there is also a well-established body of law that allows a federal court to dismiss an action under the *forum non conveniens* doctrine based on "a range of considerations, most notably the convenience to the parties and the practical difficulties that can attend the adjudication of the dispute in a certain locality." *Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 429 (2007) (citations omitted). *See also Piper Aircraft v. Reyno*, 454 U.S. 235 (1981).

Like all civil defendants, defendants in ATS litigation can move to dismiss the action on *forum non conveniens* grounds if they believe that the case is more appropriately tried in a foreign forum, either because that forum was the site of the alleged violation or because it is where the parties and/or the evidence is located. The decision to grant such a motion lies within the sound discretion of the district court.

But there is a very big difference between seeking discretionary dismissal under the *forum non conveniens* doctrine and claiming a lack of subject matter jurisdiction under the ATS. The former raises a factual question that may vary from case to case

depending on a variety of factors, including where the tort arose, the identity of the parties, and the ability of a foreign forum to adjudicate the claim fairly. The latter raises a legal question that Congress resolved when it enacted the ATS.

CONCLUSION

For the reasons stated herein, this Court should hold that the jurisdiction conferred on the federal courts by the ATS to hear cases involving torts in violation of the law of nations is not limited to torts occurring within the sovereign territory of the United States.

Respectfully submitted,

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